IN THE

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1953

No. 614

CHRIS LARSEN,
Petitioner

vs.

NORTHLAND TRANSPORTATION CO., a Corporation,
Charterer of the American Motor Vessel, "NORCO,"
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LAWRENCE BOGLE,
CASSIUS E. GATES,
EDWARD G. DOBRIN,
CLAUDE E. WAKEFIELD,
Proctors for Respondent

Office and Post Office Address:
609 Central Building, Seattle, Washington

Parwest Lithograph & Printing Co.—Seattle

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STATEMENT OF THE CASE

This is a petition for the issuance of a Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit to review its decision (66 F. (2d) 651, Ap. 53) reversing on appeal an order of the District Court for the Western District of Washington, Northern Division, dismissing a petition for limitation of liability (Ap. 32) on demurrer and motion to dismiss filed against the same (Ap. 17).

The petition for limitation of liability was filed on October 1, 1932, and alleges: that the petitioner, Northland Transportation Co., a corporation (respondent here), was the charterer and operator of the American Motor

Vessel "NORCO," and manned, victualed and navigated said vessel at its own expense, of which said vessel the Citizens Light, Power & Water Co., a corporation, was the owner; that on or about July 20, 1931, the vessel commenced loading at the Port of Seattle for a voyage to the Port of Juneau, Alaska, and thereafter sailed on said voyage, which terminated at said Port of Juneau on July 25, 1931, being the voyage in connection with which the petitioner seeks limitation of liability; that Chris Larsen (petitioner here), was a seaman employed as a member of the crew of said vessel on said voyage and on July 20, 1931, while said vessel was loading at the Port of Seattle, said Chris Larsen, while engaged in loading said vessel as a member of the crew thereof, suffered personal injuries thereon, resulting in the institution of an action by said Chris Larsen, as plaintiff, against the petitioner, as defendant, in the Superior Court of the State of Washington for King County, in which said action recovery in the sum of $25,000.00 was sought by reason of the alleged negligence of the winchdriver on said vessel going ahead with great speed on the winches, causing a strongback, which had become attached to board slings which were being moved, to strike said Chris Larsen and throw him through an open hatchway to the 'tween deck; that in said action a verdict of a jury was rendered on September 27, 1932, in favor of said Chris Larsen and against the petitioner in the sum of $12,500.00, and a judgment entered thereon on October 1, 1932, in the sum of $12,500.00, interest and costs, which said judgment remains wholly unsatisfied (Ap. 2).

The petition for limitation of liability then continues

with the additional and usual allegations entitling the petitioner to a limitation of liability and prays for relief accordingly. There was filed with the petition for limitation of liability affidavits of value, and pursuant to orders therefor an ad interim stipulation was filed and approved and monition and citation issued and due service thereof had (Ap. 1).

On October 8, 1932, the petitioner, Chris Larsen, filed exceptions to the petition for limitation of liability (Ap. 16) and a demurrer and motion to dismiss the same (Ap. 17), together with an affidavit, to which is attached the complaint, answer and reply in the state court action (being all of the pleadings therein), (Ap. 18).

The grounds alleged in support of the demurrer and motion to dismiss are as follows:

> "1. That said petition does not state facts sufficient to entitle the petitioner to limitation of its liability.
>
> "2. That there is only one possible claimant and one charterer of the motor vessel Norco and, therefore, the petitioner might have claimed and obtained the advantage and benefit of the limitation of liability statute by proper pleading in the action which has been determined in the Superior Court of the State of Washington for King County.
>
> "3. That the petitioner failed and refused to claim the advantage and benefit of the limitation of liability statute, in said Superior Court of the State of Washington, and thereby waived its right to claim and obtain the advantage and benefit of said statute" (Ap. 17).

This being substantially the same as the grounds alleged in support of the exceptions (Ap. 16).

The district court in entering its order of dismissal concluded that respondent, by failure to make any claim

in the state court of its right to limit its liability, waived such right, and that all matters pertaining to the merits of the state court action, including the right to limitation of liability, were fully adjudicated (Ap. 33).

It should be pointed out that the fact there were no additional claims to be asserted arising on the voyage did not appear until after petitioner obtained his judgment and monition had been issued in the limitation proceedings (Ap. 33).

DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

In reversing the order of the district court dismissing the petition for limitation of liability and remanding the cause for further proceedings in accordance with its opinion (Ap. 61), the Circuit Court of Appeals, speaking through Wilbur, Circuit Judge, said in part:

> "It has been held in many instances by district courts sitting in admiralty and by circuit courts of appeals reviewing those decisions that the right of the owner to limit his liability is in no wise affected by the fact that the claim against him had been prosecuted to judgment in a common law court and that a judgment had been rendered in that court for the full amount of the injury without reference therein to the limitation of the owner's liability as provided by federal law. *S. A. McCaully* (D. C.), 99 Fed. 302; *Re Old Dominion* (D. C.), 115 Fed. 845; *Gleason v. Duffy* (C. C. A. 7), 116 Fed. 298; *The Ocean Spray* (D. C. Cal.), 117 Fed. 971; *Re Starin* (D. C. N. Y.), 124 Fed. 401; *The City of Boston* (D. C. Mass.), 159 Fed. 257; *The Hoffmans* (D. C. N. Y.), 171 Fed. 455; *Re P. Sanford Ross* (D. C. N. Y.), 196 Fed. 921; *The Victor* (D. C. N. Y.), 1 F. Supp. 931. It has been so decided by

this court in *Strong v. Holmes* (C. C. A. 9), 238 Fed. 554. Also, it has been held that the admiralty court after a decree fixing the responsibility for the injury may entertain a petition for the limitation of the liability of the owner to the value of the vessel, etc., although the owner had not theretofore raised the question in the admiralty court. *The Benefactor*, 103 U. S. 239; *The Monongahela River Consol. Coal and Coke Co. v. Hurst*, 200 Fed. 711; *The Defender*, 214 Fed. 316; *The Ethelstan*, 246 Fed. 187. It appears from these cases that the proceeding to limit the owner's liability is separate and distinct from the common law remedy, or the question of liability in admiralty.

"Appellee claims that these cases are not authority upon the proposition involved here by reason of the fact that the question of whether or not the judgment of the common law court was res adjudicata as to the amount of the claim was not raised in those cases. If not specifically raised, it was necessarily and obviously involved and these decisions must be taken as authority for the proposition that the judgment of the common law court fixing the amount of the damage and the responsibility of the owner therefor is not res adjudicata as to the right of the owner to limit his liability in the subsequent proceeding in an admiralty court, where the question was not raised in the common law action.

* * *

"We conclude that the judgment of the Superior Court fixing the amount of the claimant's injuries and awarding a judgment for the value thereof is not res adjudicata as to the right of the owner, by appropriate proceedings in an admiralty court, to limit the recovery to the value of the vessel, etc., where there was no attempt to raise that question in the Superior Court. * * *

" * * * there is nothing in the decisions of the Supreme Court in *Langnes v. Green*, supra, or *Ex Parte Green*, supra, inconsistent with the right of

the appellant to subsequently litigate the question of limitation of liability in the admiralty court, on the contrary * * * this is the purport and effect of those decisions. The decisions of the Supreme Court in *Langnes v. Green* and *Ex Parte Green* are in full accord with the earlier decisions holding that the question of the owner's right to limit his liability was not prejudiced by a judgment at law or a decree in admiralty fixing the amount of the claimant's recovery, if the right to limit liability was not theretofore presented. See also, *In re Moran Bros. Contracting Co.*, 1 F. Supp. 932; and, *The Kearny*, 1933 A. M. C. 705."

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

It is claimed by petitioner that the decision sought to be reviewed is probably in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *In re Putnam*, 55 F. (2d) 73 (1932), and in conflict with applicable decisions of this court.

There is in the opinion of respondent no conflict between the decision here sought to be reviewed and that in *In re Putnam*, 55 F. (2d) 73, nor is the decision in conflict with applicable decisions of this court.

ARGUMENT

We will first refer to the applicable statutes and admiralty rules.

STATUTES

Title 46 U. S. C. A., so far as material, provides as follows:

§183. "The liability of the owner of any vessel, for any * * * act, matter, or thing, loss, damage, * * * done, occasioned, or incurred without the

privity, or knowledge of such owner * * * shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

§185. "It shall be deemed a sufficient compliance on the part of such owner with the requirements of this chapter relating to his liability * * * if he shall transfer his interest in such vessel and freight, for the benefit of such claimants, to a trustee * * *; from and after which transfer all claims and proceedings against the owner shall cease."

§186. "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense * * * shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels. * * *."

ADMIRALTY RULES

The Admiralty Rules, so far as material, provide as follows:

No. 51. "When any * * * owner * * * shall desire to claim the benefit of limitation of liability * * * said owner * * * shall and may file a libel or petition in the proper District Court of the United States * * * setting forth the facts and circumstances on which said limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner * * * in such * * * vessel, and her freight, for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation * * * for the payment thereof into court * * * or, if the said owner * * * shall so elect, the said court shall without such appraisement make an order for the transfer * * * of his * * * interest in such vessel and freight to a trustee * * *; and, upon

compliance with such order, the said court shall issue a monition against all persons claiming damages * * * citing them to appear * * * and file their respective claims * * * and the said court shall also, on the application of the said owner * * * make an order to restrain the further prosecution of all and any suit or suits against said owner * * * ."

No. 52. " * * * the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said * * * vessel and freight * * * shall be divided pro rata amongst the several claimants in proportion to the amount of their respective claims * * * saving, however, to all parties any priority to which they may be legally entitled."

No. 53. "In the proceedings aforesaid, the said owner * * * shall be at liberty to contest his * * * liability, or the liability of said * * * vessel * * * (independently of the limitation of liability claimed under said act) * * * and any person or persons claiming damages as aforesaid, and who shall have filed his or their claim under oath, shall and may answer such libel or petition, and contest the right of the owner * * * of said * * * vessel, either to an exemption from liability, or to a limitation of liability * * * or both, provided such answer shall * * * state the facts * * * by reason of which liability is claimed or right to limitation of liability should be denied."

No. 54. "The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said * * * vessel may be libeled * * * or, if the said * * * vessel be not libeled, then in the District Court for any district in which the said owner * * * may be sued in that behalf * * * ."

It has been many times asserted by this court that the statutory provisions for limitation of a shipowner's liability are to be given a liberal construction.

In *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 588, 27 L. ed. 1038 (1883), this court said:

> "In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance: but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions."

See also:

Butler v. Boston Steamship Co., 130 U. S. 527, 549, 550, 32 L. ed. 1017 (1889);

LaBourgogne, 210 U. S. 95, 121, 52 L. ed. 973 (1908);

Capitol Transportation Co. v. Cambria Steel Co., 249 U. S. 334, 63 L. ed. 631 (1919);

Evansville & B. G. Packet Co. v. Chero Cola Bottling Co., 271 U. S. 19, 21, 70 L. ed. 805 (1926);

Hartford Acci. & Indemnity Co. v. Southern P. Co., 273 U. S. 207, 214, 71 L. ed. 612 (1927).

THE SHIPOWNER MAY LIMIT LIABILITY AS AGAINST A SINGLE CLAIM

It has long been settled that there may be limitation of liability in the federal court where there is but a single claimant. *Richardson v. Harmon*, 222 U. S. 96, 56 L. ed. 110 (1911); *White v. Island Transp. Co.*, 233 U. S. 346, 351, 352, 58 L. ed. 993 (1914).

In the *Matter of the Petition of East River Towing Co.*, 266 U. S. 355, 365, 368, 69 L. ed. 324 (1924), a single claimant brought suit in the state court and a petition for limitation of liability was filed in the federal court. The following question was certified to this court:

> "If an action at law be brought such as is described in Merchant Marine Act 1920, §33, can the prosecution thereof be enjoined by the injunction provided for in Admiralty Rule 51?"

to which the answer was "Yes."

See also:

Flink v. Paladini, 279 U. S. 59, 73 L. ed. 613 (1929).

PROCEDURE TO OBTAIN LIMITATION OF LIABILITY

In *Benedict on Admiralty*, 5th Ed., Vol. 1, p. 576, §484, is found a discussion of the appropriate proceedings which may be taken to obtain limitation of liability. We quote as follows:

> "In *The H. F. Dimock* (52 Fed. 598), the court points out four ways in which the statute may be availed of, viz., (1) by the simple answer of the ship owner when sued; (2) by his libel or petition, offering a transfer of the ship to a trustee appointed by the court under Revised Statutes §4285; (3) by a

similar libel or petition, offering, instead of a transfer of the ship, a stipulation, under General Admiralty Rule 51 (formerly 54) promulgated by the Supreme Court, to pay her value as appraised under the order of the court, or a deposit in court of the amount of such appraised value, and (4) by a creditor's suit for an apportionment and *pro rata* distribution. * * * The above methods are not necessarily exclusive. The Supreme Court has said that the rules 'were intended to *facilitate* the proceedings of owners of vessels for claiming the limitation of liability secured by the statute.' (*The Benefactor*, 103 U. S. 239, 244, 26 L. ed. 351; *The Scotland*, 105 U. S. 24, 33, 26 L. ed. 1001), and if at any time it should appear that some proceeding not provided for by the rules was more appropriate for securing the result, it can hardly be doubted that such a proceeding would be sustained, and as to all details of procedure not specifically provided for by rule, their appropriateness to secure the result aimed at furnishes a criterion."

LIMITATION OF LIABILITY MAY BE HAD AFTER TRIAL ON MERITS

We will discuss the authorities dealing with the identical or substantially identical facts as in the case at bar, starting with the earlier cases.

In *The Benefactor*, 103 U. S. 239, 242, 26 L. ed. 351 (1880), a collision occurred between the schooner "Susan Wright" and the Steamship "Benefactor," which resulted in the sinking of the former with a total loss of vessel and cargo. A libel was filed against the steamer at the suit of the owners of the schooner for the loss of their vessel and a libel at the suit of the crew for the loss of their personal effects and, pending the proceedings on these libels, a petition of intervention was filed by the

owners of the schooner's cargo to recover the value of the same. The owner of the steamship "Benefactor" filed a claim and stipulation in the value of the steamer for her release and answer denying all liability. A decree was entered in favor of the libelants and intervenors assessing damages, from which an appeal was taken to the circuit court.

Thereafter the owner of the steamship filed in the district court a petition for limitation of liability and applied for an order restraining the further prosecution of the action, which restraining order was denied, and on exceptions to the petition the same was dismissed, which order of dismissal was affirmed on appeal to the circuit court. In reversing the order of dismissal, this court said:

> "The gound of dismissal relied on by the district judge (which was adopted by the circuit court) was that the petition came too late, inasmuch as it was not filed until after a trial of the cause of collision upon its merits and a final decree thereon. The judge referred to the fifty-sixth admiralty rule, which declares that in proceedings to obtain a decree for a limited liability, the owners may contest all liability on their part or that of their vessel, as well as claim a limitation of liability under the statute; provided, that in their libel or petition they shall state the facts and circumstances by reason of which exemption from liability is claimed. He supposes that this right to contest the case on the merits at the same time and in the same proceedings that a limited liability is claimed, implies that such proceedings must be instituted before the case has been tried on its merits; because a second trial of the same matter, after it has once been adjudicated, will not be deemed to have been contemplated by the rule. In supposing that a second trial of the merits, between the same parties, was not contemplated by the rule, the judge

was correct. But it was certainly not the intention of the admiralty rules to preclude a party from claiming the benefit of a limited liability after a trial of the cause of collision. * * * .

"But since the statute is imperative, that where a loss occurs in a vessel by embezzlement or by collision or other thing, without the privity or knowledge of the owner, his liability 'shall in no case exceed the amount or value of his interest in the vessel and her freight then pending,' it would be a questionable exercise, by this court, of its power to regulate the proceedings, if, by such regulation, it should prevent a party from having the benefit of the law unless he took initiatory steps for that purpose before it appeared that he was liable at all. Such was not the intention of the rules adopted in 1872. Admiralty Rules, 54-57. They were intended to facilitate the proceedings of the owners of vessels for claiming the limitation of liability secured by the statute without regard to the time when such proceedings might be commenced, or whether before or after the general liability should be fixed. To require such proceedings to be commenced before a trial of the cause of collision would in many cases work injustice. In addition to the reasons already adverted to, it may be added that the owners of the vessel found in fault may often not know the amount of damage and loss sustained by the other vessel and her cargo. It may greatly exceed their expectations, and, contrary to what was originally known or supposed, may turn out to be much greater than the value of their own vessel and the freight pending thereon. * * * .

"Precisely when the owners of a ship in fault ought to be regarded as precluded from instituting proceedings for a limitation of liability might be difficult to state in a categorical manner. Perhaps they can never be precluded so long as any damage or loss remains unpaid. * * * .

"The petition for relief in the present case was

justly liable to exception so far as it sought to retry the question of fault and general liability as between the petitioners and the parties in the libel suits. That question was determined by the decree made upon the libels which had been filed; which decreee could only be reviewed on appeal. But so far as the petition sought a limitation of the owners' liability to the value of the ship and freight, it was free from objection and ought to have been sustained; and the libellants and intervenors ought to have been restrained, by order of the court, from collecting or attempting to collect or enforce their respective decrees, whether obtained in that court or in the court of appeal, in any other manner than by the *pro rata* distribution of the fund standing by stipulation in place of the ship and freight."

The City of Norwich, 118 U. S. 468, 489, 30 L. ed. 134 (1886).

In the *S. A. McCaulley*, 99 Fed. 302, 304 (D. C. Pa. 1899), a petition for limitation of liability was filed against a *single claimant* after a judgment in the state court. Exceptions to the petition were filed, alleging that there was but one suit pending against the petitioners and as the supreme court of Pennsylvania had decided that the common pleas court could apply the law limiting the liability of the ship owners, the district court had no jurisdiction to entertain the petition. The court said:

"* * * as I look at the statutes and the decisions upon this subject, it is impossible to deny them the right to come into the federal tribunal, even after they have taken their chance of a favorable verdict in the common pleas. * * *

"* * * the statute fixes no limit of time within which the court must be asked to act, and the Supreme Court of the United States in *The Benefactor*, 103 U. S., on page 245, 26 L. ed. 351, has intimated that the right may exist as long as any damage or

> loss remains unpaid. The court says: 'Precisely when the owners of a ship in fault ought to be regarded as precluded from instituting proceedings for a limitation of liability might be difficult to state in a categorical manner. Perhaps they can never be precluded, so long as any damage or loss remains unpaid.' "

The exceptions were overruled on terms requiring the payment of costs. Cited in *White v. Island Transp. Co.*, 233, U. S. 346, 351, 58 L. ed. 993.

In *Re Old Dominion S. S. Co.*, 115 Fed. 845, 850 (D. C. N. C. 1902), a petition for limitation of liability was filed after judgment had been obtained against the petitioner in the state court, from which an appeal by the petitioner was pending, and an injunction against further proceedings was issued and limitation granted as to this claim and exemption as to another. The court, in referring to the petitioner, said:

> "It has the privilege of invoking the marine law at any time before a judgment is actually paid. (*The Benefactor*, 103 U. S. 239; 26 L. ed. 351; Ben. Adm. §659; Hughes, Adm., pp. 228, 229) * * * ."

In *Gleason v. Duffy*, 116 Fed. 298, 301 (C. C. A. 7, 1902), the owners of a vessel were sued in the state court for damages by reason of personal injuries sustained by a *single claimant*. The owners, by their answer, claimed the benefit of limitation of liability, to which plea a demurrer was sustained, and judgment against the owners was entered, which was affirmed on their appeal, on which appeal a supersedeas bond was given. (*Duffy v. Gleason* (Ind.), 58 N. E. 729). Thereafter the owners filed in the district court a petition for limitation of liability. It was objected that resort to the proceedings to

limit liability was not available after the rendition of the judgment at common law. The court, in denying this contention, said:

> "We think * * * that the question is set at rest by the decision in *The Benefactor*, 103 U. S. 239, 26 L. ed. 351. * * * .
>
> "This decision seems to us conclusive of the question here. It is said that that case is distinguishable from the one in hand because there the proceeding was in admiralty in the district court, while the one here was a common-law remedy sought in a state court. We think the distinction is unavailing. Whether the remedy resorted to be one in admiralty or at common law, the right to limitation under the statute is the same; and, while the right to a common-law remedy is reserved, it is so reserved subject to the provisions of the statute which sanctions proceedings for the limitation of liability. The appeal taken by the owners in the state court was properly resorted to in contestation of their liability, and to correct any supposed errors of the trial court. They had legal right to do that, and should be no more concluded by the exercise of that right than by the defense of the case in the trial court. The bond which they gave upon appeal was one which the law required them to give in order that they might properly and safely present their contention to the appellate court. We do not think that that should preclude them from asserting their rights under the statutes of the United States."

In *The Ocean Spray*, 117 Fed. 971 (D. C. Cal., 1902), a petition for limitation of liability was filed after a *single claimant* had recovered a judgment in the state court, which was reversed on appeal and pending for new trial. Exemption from liability was granted on payment of the claimant's costs incurred in the state court proceedings.

In *Re Starin*, 124 Fed. 101, 102 (D. C. N. Y. 1903) a petition for limitation of liability was filed against a *single claimant* after judgment in the state court was affirmed on appeal. The court said:

> "The plaintiff in the former action and the claimant in this proceeding interposed the defenses: First, that by the proceedings in the state court the defendant waived the right to seek remedy here; * * * fourth, that the claimant was the only person injured, and that the court cannot exercise its jurisdiction, as the petitioner had a complete remedy in the state court.
>
> "It is concluded (1) that the judgment in the state court established that the defendant and his servants were negligent * * * and that the injury resulted from such negligence; (2) that the petitioner has not waived his right to limit his liability in this court * * * ."

In *The City of Boston*, 159 Fed. 257, 259 (D. C. Mass. 1906, reversed on other grounds in *Davenport v. Winnisimmet Co.*, 162 Fed. 862, and certiorari denied, 212 U. S. 574, 53 L. ed. 657), a petition for limitation of liability was filed after a verdict had been obtained against the petitioner in the state court on a *single claim*, against which a motion for new trial had been overruled, and while the allowance of its bill of exceptions was pending. Limitation was granted. The court said:

> "The Winnisimmet Company had without doubt ample time after the collision to file a petition for limitation of liability before Mrs. Davenport's suit against it came on for trial. It is true, as urged on her behalf, that allowing its petition to be filed here after the verdict in that suit is in effect allowing the company to take the chance of a verdict in the state court in its favor, but to hold in reserve at the same time the power to defeat an adverse verdict

by resorting to this court. It has been repeatedly held, however, that prior litigation of the question of his liability in the state courts will not deprive a vessel owner of the right to resort to an admiralty court for limitation of liability, however far the prior litigation may have proceeded. In *The S. A. McCaulley* (D. C.), 99 Fed. 302, there had been two years' litigation in the state court and a verdict against the petitioner. In *Re Old Dominion S. S. Co.* (D. C.), 115 Fed. 845, a judgment had been obtained against the petitioner. In *Gleason v. Duffy*, 116 Fed. 298, 54 C. C. A. 100, there had been a judgment against the petitioners from which they had appealed, and the state appellate court had affirmed the judgment. In *The Ocean Spray* (D. C.), 117 Fed. 971, there had been an adverse judgment, an appeal by the petitioner, and the state appellate court had reversed the judgment and remanded the case for a new trial. In *Re Starin* (D. C.), 124 Fed. 101, there had been two successive appeals by the petitioner from a state court judgment against him, the final result whereof had been affirmance of the judgment. These decisions are all based upon the principles declared in *The Benefactor*, 103 U. S. 239, 26 L. ed. 157. In view of them and of the law as stated by the Supreme Court in that case, this petitioner cannot be regarded as having waived or lost its right to claim the benefit of the limited liability act, notwithstanding its delay in asserting its claim to that benefit here, and notwithstanding the contest it has maintained with regard to Mrs. Davenport's claim in the state court."

In *The Hoffmans*, 171 Fed. 455, 460 (D. C. N. Y. 1909), on a petition for limitation of liability filed against a *single claimant*, the court said:

> "Assuming that the owner of a vessel can invoke the remedy of the statute in a state court, it is evident that he can only do so effectively by way of defense to the claim or claims involved in a single suit. If

he desires to receive the general protection given by the statute, he cannot obtain it otherwise than by resorting to its terms and the rules provided thereunder and, in any event, he is not obliged to adopt that method of a defense. * * *.

"If there is more than one forum in which ship owners can obtain relief under the statute, it would seem that the right of selecting the court rests with them. If they wish to proceed in an affirmative manner, they cannot do so except in the District Courts and they must use their machinery to secure full protection. * * *.

"It is well settled that a shipowner can resort to the District Courts at any time before satisfaction of judgment, even after the claim or claims has been fully litigated in the state courts. *The Benefactor*, 103 U. S. 239, 26 L. ed. 351. Notable instances of a final resort to the District Court for limitation, after proceedings in a state court, are: In *Re Starin*, and *The S. A. McCaulley*, supra. * * *."

Cited in *White v. Island Transp. Co.*, 233 U. S. 346, 352, 58 L. ed. 993.

In *Re P. Sanford Ross*, 196 Fed. 921, 923 (D. C. N. Y. 1912, reversed on other grounds, 204 Fed. 248), a petition for limitation of liability was filed against a *single claimant* after verdict in the state court. The court said:

"A vessel may be surrendered under the statute allowing limitation either before or after a verdict has been obtained settling the responsibility for the accident. *City of Boston* (D. C.), 159 Fed. 257; *The Benefactor*, 103 U. S. 239, 26 L. ed. 351. If a verdict is recovered in an action in a state court or in a common-law action in a United States Court, and if a right to limit all liability to the value of the craft upon which the accident occurred is given by act of Congress, then the right of trial by jury may be enjoyed by the plaintiff; but the collection of damages may be confined to the value of the vessel on which the liability occurred.

"A proceeding to limit liability need not be affected by the form or the manner in which the liability is fixed. The statute of Congress was intended to and does allow a substitution of the res for the personal claim against the individual in certain kinds of cases, and no reason is shown why this should not apply to a cause of action in judgment as well as to a cause of action before trial.

"In the present instance the question is not whether the judgment can be avoided. That matter is res adjudicata, and the administratrix's right to her judgment has been established. But the case presents the question whether because of the place in which the accident occurred, and through prior lack of knowledge of the defective conditions, the owner of the vessel can avoid as great responsibility for the accident as would have rested upon him if the pile driver had been working upon staging attached to the shore."

In *Monongahela River Consol. Coal & Coke Co. v. Hurst*, 200 Fed. 711, 713 (C. C. A. 6, 1912), a petition for limitation of liability was filed after decrees had been entered on libels in personam and affirmed on appeals, in which appeals supersedeas bonds were given. These trial proceedings were urged as a bar to the proceedings to limit liability. The court said:

"Under admiralty rules Nos. 54 to 58 (29 Sup. Ct. xlv, xlvi), the benefit of the statute can be had under libel filed by the owner in a District Court, appraisement of such owner's interest in the vessel and pending freight, and the bringing of the amount of such appraisal into court, by either (a) actual payment into court; or (b) giving stipulation for such payment when ordered; or (c) the transfer by libelant of his interest in the vessel and freight to a trustee appointed by the court, as provided by section 4285 (U. S. Comp. St. 1901, p. 2944).

"The proceeding to limit liability will not affect the status of the appellees' decrees in the collision suits. Those decrees are final adjudications, both as to liability and amount of damages. *Norwich Co. v. Wright*, 13 Wall. 104, 122, 20 L. ed. 585; *The Benefactor*, 103 U. S. 239, 26 L. ed. 351; *The Scotland*, 105 U. S. 24, 36, 26 L. ed. 1001; *Providence, etc., S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. ed. 1038; *Gleason v. Duffy* (C. C. A. 7), 116 Fed. 301, 54 C. C. A. 100. But if appellants' liability shall be limited, only a small portion of appellees' decrees can in fact be paid.

" * * *

" * * *. While it is true that appellants had the right to take the benefit of the limitation of liability directly in the collision suits (*The Scotland*, supra, 105 U. S. 31, 26 L. ed. 1001; *The Great Western*, 118 U. S. 520, 525, 526, 6 Sup. Ct. 1172, 30 L. ed. 156), they were not bound to do so. They had the right to first contest liability for the collision in any court, state or federal, in which action therefor might be brought, including the appellate court of last resort, without raising the question of limitation, and without thereby waiving the right to take the benefit of the statute. *The Benefactor*, supra, 103 U. S. 244, 26 L. ed. 351; *The City of Norwich*, 118 U. S. 468, 489, 6 Sup. Ct. 1150, 30 L. ed. 134; *The San Pedro*, 223 U. S. 365, 372, 32 Sup. Ct. 275, 56 L. ed. 473; *Gleason v. Duffy*, supra, 116 Fed. 298, 301, 54 C. C. A. 100. * * *."

"The question, however, of the effect of giving the supersedeas bond presents more difficulty.

"The contention that they thereby elected to substitute the responsibility of the surety on the supersedeas bond for the security of the vessel and its freight, and so waived the benefit of the limitation statute, is plausible. But does this view give full effect to the language of the statute and to its intention as construed by the courts? We are con-

strained to believe it does not. The purpose of the statute was to encourage shipbuilding and to bring our system of admiralty, in respect to personal liability, into harmony with the general maritime law of modern Europe. *Norwich Co. v. Wright*, 13 Wall, 104, 116, 20 L. ed. 585; *Butler v. S. S. Co.*, supra; *The City of Norwich*, 118 U. S. 468, 490, 6 Sup. Ct. 1150, 1155 (30 L. ed. 134). * * *.

"The construction of this statute has been uniformly liberal. In the case of *The Benefactor*, Justice Bradley said (103 U. S. 244, 26 L. ed. 351):

" 'But since *the statute is imperative* that where a loss occurs in a vessel, by embezzlement or by collision or other thing, without the privity or knowledge of the owner, his liability 'shall *in no case* exceed the amount or value of his interest in the vessel and her freight then pending,' it would be a questionable exercise, by this court, of its power to regulate the proceedings, if, by such regulation, it should prevent a party from having the benefit of the law unless he took initiatory steps for that purpose before it appeared that he was liable at all.'

" * * *.

"In Hughes on Admiralty, §172, it is said:

" 'The owner may take advantage of the statute at any time before he is actually compelled to pay the money. Under the American practice he may contest his liability for any damages at all, fight that through all the courts, and, if finally defeated, take advantage of the statute.'

"In Benedict on Admiralty (4th Ed.), §520, the author says:

" 'There seems to be no limit of time, the expiration of which will cut off the owner of the vessel from taking advantage of the provisions of the statute. * * * He may wait until he is sued, and defend the case, and appeal from an adverse verdict, and, after

affirmance by the appellate court, still file his libel for limitation of his liability.'

" * * *

"It was the evident purpose of the limitation statute to make the liability of an owner or charterer, when not personally in fault, precisely the same, whether suit is brought in personam or in rem. The view that the giving of the supersedeas bond, and the consequent stay of execution necessary to the complete preservation of appellants' rights pending appeal, did not constitute a waiver of the then existing right to limit liability, if and when such liability should be established, is, we think, more consonant with the language and spirit of the statute, and more in harmony with the decisions thereunder, than is the contrary view. The record does not indicate that appellants intended to abandon the benefit of the statute, should occasion arise for invoking it. The only substantial advantage which appellants gained through the supersedeas was a postponement of the time when resort to the limitation statute must be had; and the only injury suffered by appellees is through such delay as may have resulted in ultimately realizing the amount apportionable to their decrees. Had appellants prevailed on the appeal to this court in the collision suits, such resort might never have been necessary, and the right to such postponement of limitation proceedings until after the fixing of liability is, as has already been said, well settled. Thus, through the supersedeas bond, appellants have practically preserved only the right which the statute was intended to give them, and a right which could have been preserved (without a surrender of the vessel) by giving (instead of a supersedeas bond) a stipulation under the limitation procedure for payment of the appraised value of vessels and freight into court when ordered. We think it the better view that the obligation of the surety was only coextensive with that of the principal, that the liability incurred under the

supersedeas bond was impliedly subject to the enforcement of the limited liability statute, and would be itself superseded, at least pro tanto, by the decree limiting such liability. We see no merit in the proposition that the surety can be held to full liability, notwithstanding the discharge of the principal. Decisions based upon the express provisions of the bankruptcy act are not in point.

"It follows from this view that the plea in bar to the petition to limit liability should not have been sustained. * * *."

In *The Defender*, 214 Fed. 316, 317 (D. C. Wash. 1914), it was held that a petition for limitation of liability apparently against a *single claimant*, did not come too late, although filed after a finding of liability in an action in rem in admiralty. The court said:

"Petitioner offers to surrender the Defender to a trustee for the benefit of libelant and others entitled to share therein, and prays discharge from all liability. Libelant excepts because of claimant's laches and the insufficiency of the foregoing allegations. * * *. Petitioner cites the following cases: *New York & W. S. S. Co. v. Mount*, 103 U. S. 239, 26 L. ed. 351; *The City of Boston* (D. C.), 159 Fed. 257; *In re Starin* (D. C.), 124 Fed. 101; *Dyer v. Nat. Steam Nav.*, Fed Cas. No. 4, 225; *The Benefactor*, 102 U. S. 214, 26 L. ed. 157; *Benedict on Admiralty* (4th Ed.), p. 349. The exception because of claimant's laches is overruled. *Benedict on Admiralty*, §522."

In *The T. W. Wellington*, 235 Fed. 728, 729 (D. C. N. Y. 1916), a petition for limitation of liability was filed against a *single claimant* after judgment in the state court and appeal therefrom, on which a bond was given to stay execution. The court said:

"The boat may be surrendered while liability is contested, and a bond given as security for carrying on litigation. *The Benefactor*, supra. A judgment may

have been obtained before hearing of or application for the limitation, and the court may prevent the parties from attempting by execution or otherwise to collect any moneys recovered by them beyond the amount awarded in the said proceedings. *The Benefactor*, 103 U. S. 244, 26 L. ed. 351; In *Re P. Sanford Ross* (D. C.), 196 Fed. 921 (reversed on other grounds, 204 Fed. 248, 122 C. C .A. 516); *The Capt. Jack* (D. C.), 169 Fed. 456.

"In *Gleason v. Duffy*, 116 Fed. 298, 54 C. C. A. 100, the Circuit Court of Appeals agreed with the court below, which held that the petitioner, Gleason, could have a decree restraining a judgment creditor, Duffy, from collecting his judgment and from prosecuting the suit upon the appeal bond. The surety was not before the court, but the action against the surety was brought to the court's attention. The Circuit Court of Appeals said that the proceeding could be instituted after the 'rendition of a judgment at common law,' but should be 'seasonably instituted,' so as to allow proper determination of the 'extent' of liability, citing *Transportation Co. v. Wright*, 13 Wall. 104, 20 L. ed. 585. It therefore made a condition of the limitation payment of costs in the trial court and on appeal in the damage action."

In *Strong v. Holmes*, 238 Fed. 554, 556 (C. C. A. 9, 1916), a *single claimant* sustained personal injuries and a judgment for damages was obtained in the Superior Court of the State of Washington for King County, and thereafter a second judgment was obtained thereon in the district court of Alaska and execution threatened thereon. A petition for limitation of liability was thereupon filed. In reversing the decision below dismissing the petition for limitation of liability, the court among others stated:

"It is suggested that the libel or petition was not

filed in time; but we think otherwise. *The Benefactor*, 103 U, S. 239, 26 L. ed. 351.

"It is also urged that there is only one claimant * * * but the fact that there is but one claim is immaterial. *White v. Island Transportation Co.*, 233 U. S. 346, 34 Sup. Ct. 589, 58 L. ed. 993. * * *."

In *Societe Naphthes Transports v. Bisso Towboat Co.*, 241 Fed. 463, 465 (C. C. A. 5, 1917, certiorari denied, 245 U. S. 652, 62 L. ed. 532), the court said:

"Sections 4284, 4285 and 4286 (Comp. St. 1916, §§8022-8024), relate to procedure under Section 4283.

"It seems to be settled that proceedings to limit the liability of shipowners under said section supersede all other actions and suits for the same loss or damage in the state and federal courts. See *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U. S. 578, 3 Sup. Ct. 379, 27 L. ed. 1038; also *Monongahela River Consolidated Coal & Coke Co. v. Hurst*, 200 F. 711, 119 C. C. A. 127. In this last cited case it is held that the right of a vessel owner to a limitation of liability under the statute as against a decree for collision damages is not waived by the giving of a supersedeas bond or appeal from such decree, but the liability of both principal and surety on such bond is impliedly subject to such limitation, citing *The Scotland*, 105 U. S. 31, 26 L. ed. 1001, and *The Great Western*, 118 U. S. 520, 6 Sup. Ct. 1172, 30 L. ed. 156, et seq; and in that case it was further held that the shipowner had the right to first contest liability for the collision in any court, state or federal, in which suit therefor might be brought, including the appellate court of last resort, without raising the question of limitation, and without thereby waiving the right to take the benefit of the statute, and numerous cases are cited in support thereof."

In *The Ethelstan*, 246 Fed. 187, 188 (D. C. Fla. 1917), exceptions were overruled to a petition for limitation of

liability filed after a decree in rem had been entered on a *single claim*. The court said:

> "I have not only examined the authorities referred to in the briefs of proctors, but also the authorities referred to in the note to the section in the Federal Statutes Annotated, Vol. 4, page 839, et seq. and I am of opinion that the right secured to the ship-owner by the section is not waived by failure to assert it before decree is entered."

In *The Victor*, 1 F. Supp. 931 (D. C. N. Y. 1927), a petition for limitation of liability was filed against a *single claimant* after a judgment in the state court, from which an appeal was taken and a supersedeas bond posted and the judgment affirmed. The court said:

> "The right of the owner of the vessel, the petitioner, to maintain proceedings for limitation of liability after the recovery of judgment on the claim against which limitation is sought cannot be denied, and that is also true even after the appeal was taken and the supersedeas bond was given, but, in addition to surrendering the vessel or giving bond for its value, under the facts stated, the petitioner must pay interest on the value of the vessel from the date of judgment; the costs of the trial and the appeal. *The T. W. Wellington* (D. C.), 235 F. 728; *Monongahela River Consol. Coal & Coke Co. v. Hurst* (C. C. A.), 200 F. 711; *Gleason v. Duffy* (C. C. A.), 116 F. 298."

THE DECISIONS IN LANGNES V. GREEN, 282 U. S. 531, 75 L. ED. 520 (1931), AND EX PARTE GREEN, 286 U. S. 437, 76 L. ED. 1212 (1932)

The petitioner relies upon these two cases herein referred to as the *Langnes* case as changing the law as settled in the foregoing authorities. The facts in the

Langnes case were as follows: Green brought an action against Langnes in the state court to recover damages for personal injuries suffered while employed upon the "Aloha," a fishing vessel owned by Langnes. While this action was pending, and two days before the date set for trial, Langnes filed a petition for limitation of liability in the federal district court and secured an order restraining the further prosecution of the state court action. It was stipulated by the parties that the vessel was of no greater value than the sum of $5,000. Green filed his claim in the limitation proceedings and thereupon moved to dissolve the restraining order. The district court denied the motion and tried the cause in respect of Green's claim, holding there was no liability and entering a decree accordingly. On appeal to the Circuit Court of Appeals, the decree was reversed on the ground that the district court was without jurisdiction and this court heard the cause on a writ of certiorari and in reversing both courts stated in part as follows (*Langnes v. Green*, supra, p. 539):

> "Section 24 (3) of the Judicial Code (U. S. C. title 28, §41 (3)) confers upon the district courts of the United States admiralty and maritime jurisdiction, 'saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it.' The provisions of the statute in respect of limitation of liability confer upon the owner of a vessel in a variety of cases, including the present case, when loss is occasioned without the privity or knowledge of the owner, the right to limit his liability to the value of his interest in the vessel and her freight then pending. That the action brought in the state court was authorized by the first of the statutes referred to is plain. That the

petition of the owner in the present case was properly brought, and that the federal court had jurisdiction to entertain it, whether there was a plurality of claims or only one, is equally clear. *White v. Island Transp. Co.*, 233 U. S., p. 351, 58 L. ed. 996, 34 S. Ct. 589, supra. The situation, then, is that one statute gave respondent the right to a common-law remedy, which he properly sought in the state court; and another statute gave petitioner the right to seek a limitation of liability in the federal district court. Needless to say that if the case for a limitation of liability assumes such a form that only a federal court is competent to afford relief, the jurisdiction of that court is exclusive and must be exerted to dispose of the entire cause; and the action in the state court may not be further prosecuted.

" * * * this court has accepted the view that, 'in a state court, when there is only one possible claimant and one owner, the advantage of this section (§4283, U. S. C. title 46, §183) may be obtained by proper pleading. * * *

"Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the exercise of its common-law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject. * * *. Notwithstanding this, however, the shipowner was free to invoke the jurisdiction of the federal district court (*White v. Island Transp. Co.* 233 U. S. 346, 58 L. ed. 993, 34 S. Ct. 589, supra); and, that having been done, the question which arose was not one of jurisdiction, but, as will later more fully appear, was whether as a matter of discretion that jurisdiction should be exercised to dispose of the cause.

"The term 'discretion' denotes the absence of a hard and fast rule. *The Styria v. Morgan*, 186 U. S. 1, 9, 46 L. ed. 1027, 1033, 22 S. Ct. 731. When invoked as a guide to judicial action it means a sound dis-

cretion, that it to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

"In the case now under review the problem presented to the district court by the motion of respondent was quite simple. Upon the face of the record the state court, whose jurisdiction already had attached, was competent to afford relief to the petitioner. The difference in the effect of adopting one or the other of the two alternatives presented to the district court was obvious. To retain the cause would be to preserve the right of the ship owner, but to destroy the right of the suitor in the state court to a common-law remedy; to remit the cause to the state court would be to preserve the rights of both parties. The mere statement of these diverse results is sufficient to demonstrate the justice of the latter course; and we do not doubt that, in the exercise of a sound discretion, the district court, following that course, should have granted respondent's motion to dissolve the restraining order so as to permit the cause to proceed in the state court, retaining, as a matter of precaution, the petition for a limitation of liability to be dealt with in the possible but (since it must be assumed that respondent's motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty. The failure to do this, in our opinion, constituted an abuse of discretion subject to the correcting power of the appellate court below and of this court."

Following the subsequent remission of the cause to the state court, pursuant to this decision, Green put in issue

the right of Langnes to limited liability by challenging the seaworthiness of the vessel and the lack of the owner's privity or knowledge. The matter was then properly brought before the district court and that court held that, the question of Langnes' right to limited liability having been raised, the cause became cognizable only in admiralty, and that its further prosecution in the state court should be enjoined. 56 F. (2d) 647. A motion for leave to file a petition for mandamus against the district court to show cause why a writ should not issue requiring the judge thereof to conform to the opinion in *Langnes v. Green*, supra, was denied, in *Ex Parte Green*, supra, p. 438, the court stating:

> "We reversed the decrees of both courts, and remanded the cause to the district court for further proceedings. We held that the action was properly brought in the state court under §24 (3) of the Judicial Code, U. S. C. title 28, §41 (3), which saves to suitors in all cases of admiralty 'the right of a common-law remedy where the common law is competent to give it,' and that the petition for a limitation of liability also was properly brought in the federal district court. The situation then being that one statute afforded the right to a common law remedy, and another the right to seek a limitation of liability, we said that a case was presented for the exercise of the sound discretion of the district court whether to dissolve the restraining order and permit the state court to proceed, or to retain complete jurisdiction; and, upon consideration of the matter, we held that such discretion should have been exercised so as to permit the state court to proceed.
>
> "But we also said that the district court, as a matter of precaution, should retain the petition for a limitation of liability 'to be dealt with in the possible but (since it must be assumed that respondent's

motion was not an idle gesture but was made with full appreciation of the state court's entire lack of admiralty jurisdiction) the unlikely event that the right of petitioner to a limited liability might be brought into question in the state court, or the case otherwise assume such form in that court as to bring it within the exclusive power of a court of admiralty.'

" * * *

"It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case.

"Notwithstanding the foregoing, Green, following the remission of the cause to the state court, put in issue the right of the owner to limited liability, by challenging the seaworthiness of the vessel and the lack of the owner's privity or knowledge. The matter was properly brought before the federal district court, and that court held that the question of the owner's right to limited liability having been raised, the cause became cognizable only in admiralty, and that its further prosecution in the state court should be enjoined. In this the district court was right, and the motion for leave to file the petition for writ of mandamus must be denied."

It is nowhere intimated in the *Langnes* case that this court was purporting to overrule the long line of authorities herein cited permitting limitation of liability after judgment or decree. There is nothing in the *Langnes* case indicating that this court had any intention of holding that in the case of a single claim the ship owner must, if sued in the state court, then and there seek limitation of liability.

The *Langnes* case only involved the proper exercise of

discretion under the peculiar circumstances there presented, the right to limitation of liability and the value of the vessel being admitted, to afford to the plaintiff in the state court "the right to a common-law remedy." That the *Langnes* case is so limited is illustrated by subsequent reference thereto in the following cases:

Kansas City S. R. Co. v. United States, 282 U. S. 760, 763, 75 L. ed. 684 (1931);

Canada Malting Co. v. Paterson Steamships, 285 U. S. 413, 420, 76 L. ed. 837 (1932);

Burns v. United States, 287 U. S. 216, 223, 77 L. ed. 266 (1932);

Rogers v. Guaranty Trust Co., 288 U. S. 123, 131, 77 L. ed. 652 (1933);

Western Union Telegraph Co. v. Tompa, 51 F. (2d) 1032, 1034 (C. C. A. 2, 1931);

Wittig v. Canada S. S. Line, 59 F. (2d) 428, 430 (D. C. N. Y. 1932);

Southern Pacific Co. v. Klinge, 65 F. (2d) 85, 87 (C. C. A. 10, 1933);

Great North Woods Club v. Raymond, 54 F. (2d) 1017, 1018 (C. C. A. 6, 1931), in which latter case the court said:

"* * * the *Langnes* case, at page 541 of 282 U. S. 51 S. Ct. 243, 247, points out that the discretion in this respect must not be so exercised as to prevent each suitor from pursuing, in state or in federal court, the right of action which state or federal laws give to him in that court."

In the *Langnes* case the state court suit was pending undetermined when the petition for limitation was filed and all language used by the court must necessarily be considered in reference to the facts there presented, namely, a plaintiff seeking a common law remedy in the

state court and the shipowner at the same time desiring to obtain limitation of liability, and it then appearing that there was but a single claim. The *Langnes* case balances the respective rights of the parties in that situation and upon the record there presented. In the case here the petitioner has had his common law remedy in the state court and no balancing of convenience or exercise of discretion is presented. The case has now assumed such form in the state court that only a court of admiralty is competent to afford respondent relief. There is no conflict between the decision here sought to be reviewed and the *Langnes* case.

As above stated, it is claimed that the decision sought to be reviewed is in conflict with *In re Putnam*, 55 F. (2d) 73 (C. C. A. 2, 1932). In that case Christie, as administratrix of the estate of one dying as the result of injuries on a yacht belonging to Putnam, made claim against Putnam for an amount in excess of the value of the yacht. Putnam thereupon filed a petition for limitation of liability in the federal district court and obtained an injunction against all actions. Christie filed a claim and moved to vacate the injunction; this being denied an appeal was taken to the Circuit Court of Appeals and that court, in holding that the injunction should be vacated, said:

> "*Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. ed. 520, modified what had theretofore been supposed to be the effect of *White v. Island Transportation Co.*, 233 U. S. 346, 34 S. Ct. 589, 58 L. ed. 993, by holding that, while a petition for limitation might be filed against a single claim and held in terrorem, ordinarily no injunction would go to prevent an action elsewhere. * * *. The single claimant

had there already commenced an action, and this is the only ground for distinguishing the case at bar. Both District Judges thought this difference critical, adopting the view that limitation proceedings were in rem, and that the case was an instance of the familiar doctrine that the jurisdiction of the earlier court in a suit involving custody over a res is exclusive. The only question for us is whether this is correct.

"We think that it is not. * * *."

There, as in the *Langnes* case, the claimant was seeking to obtain a common law remedy in the state court and the decision merely permits this by vacating the injunction.

Subsequent to the decision in *In re Putnam*, 55 F. (2d) 73, the identical case here presented was passed on by Campbell, D. J., in *In re Moran Bros. Contracting Co.*, 1 F. Supp. 932 (D. C. N. Y. 1932), the court saying:

"This is a motion in a proceeding for limitation of liability, made by a successful claimant in a personal injury action against the petitioner, for an order dismissing the petition and vacating the injunction.

"The claimant brought an action under the Jones Act (Section 33 (46 U. S. C. A. §688)) in the state court, and recovered a judgment for $6,152, damages and costs.

"No issue of the right of the petitioner to limit liability was tendered or decided in the state court, and the petitioner lost no rights thereby.

"While under *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. ed. 520, the state court is competent to entertain a claim of the shipowner for limitation of liability, and to afford him appropriate relief, the shipowner was not bound to seek that relief in the state court, but was free to invoke the jurisdiction of this court. In other words, where

there is but a single claim on which the claimant can choose his own forum to try the issue of liability, the shipowner can choose his own forum to try the issue of his right to limit that liability.

"This court has jurisdiction, and should entertain a petition to limit liability after a trial of the issues of liability, and to restrain further proceedings in the common-law court, or execution on the judgment or decree obtained. *The Benefactor*, 103 U. S. 239, 26 L. ed. 351; *The Victor* (D. C.), 1 F. Supp. 931, 1927 A. M. C. 1121; *In re Starin* (D. C.), 124 F. 101; *The T. W. Wellington* (D. C.), 235 F. 728.

"No laches has been shown, as the shipowner was not required to claim limitation until a liability on its part was established.

"The judgment in the state court, of course, establishes the amount of the claimant's damage, but does not determine the issue of the shipowner's right to limit, and no authority is cited, nor that I have found, which required the shipowner to litigate his right to limitation of liability in the state court.

"Motion denied."

See also: *The Kearny*, 3 F. Supp. 718, 720 (D. C. N. Y. 1933), where the court, in passing upon a motion to dissolve a restraining order, issued by the court in proceedings to limit liability, said:

"The question whether the injunction should be dissolved or modified rests upon the 'exercise of a sound discretion' of the court. *Langnes v. Green*, supra."

and discusses various questions of procedure.

It is submitted that where as here the petitioner has had the benefit of a jury trial on his claim, there is nothing to now prevent the federal district court entertaining respondent's petition for limitation of liability and proceeding thereon in the ordinary course of admiralty

procedure. Any other decision would deprive respondent of its statutory right to limitation of liability.

THE STATE COURT JUDGMENT IS NOT *RES JUDICATA* OF RESPONDENT'S RIGHT TO LIMITATION OF LIABILITY

We next consider the suggestion of the petitioner that the judgment in the state court is *res judicata* of the respondent's right to limitation of liability. This, of course, is predicated on the erroneous assumption that the respondent was required to seek the benefits of the limited liability act by defense in the state court. As the quotation from *Benedict on Admiralty*, supra, p. 10, discloses, and as the cases heretofore cited hold, the obtaining of limitation of liability by pleading the same in defense is only one of several alternatives open to the shipowner. It further ignores the authorities hereinabove cited to the contrary, and no authority in support of the proposition is referred to.

Petitioner asserts that "if the respondent could have claimed its right to a limited liability in the state court but failed to do so, that issue is now clearly *res judicata* (Pet. 11)." This assertion assumed a situation which is not here presented, namely, that if respondent had claimed a limitation of liability in the state court the petitioner would have confessed the right to limitation, as otherwise the state court would have had no jurisdiction to determine respondent's right to limitation of liability. *Ex Parte Green*, 286 U. S. 437, 76 L. ed. 1212.

The jurisdiction of the state court over the respondent's right to a limitation of liability was dependent both on

the respondent submitting the same to the state court and the petitioner confessing the right to limitation. Under these circumstances it is difficult to understand how the petitioner rightfully contends that the respondent "could have claimed its right to a limited liability." As stated by the Circuit Court of Appeals in the decision now sought to be reviewed, where as here the jurisdiction of the state court to pass upon the question of the limitation of liability, was not fixed by agreement as to value and right to limitation, as in the *Langnes* case, that court had no jurisdiction of the issue now presented and the respondent was under no duty to set up its right to limitation in that court. *Ash Sheep Co. v. United States*, 252 U. S. 159, 170, 64 L. ed. 507 (1920).

But even assuming that the respondent could have obtained the appropriate limitation of liability in the state court action, nevertheless it was not required to do so and the state court judgment is not *res judicata* of the issue as it was not presented or passed upon. This is conclusively demonstrated by the authorities hereinabove cited.

Petitioner asserts that a previous judgment is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. But as stated in the authority cited by petitioner for this proposition, and following his quotation therefrom (Pet. Br. 30):

> " * * * this rule bars only those matters which negative or are inconsistent with the facts which sustained the former judgment; and if the matters on which a second action is based, although they

might have been used as a defense in the first suit, constitute a substantive and distinct cause of action which defendant in the former suit was not bound to plead or set up, the former judgment is not a bar." 34 C. J. §1267, p. 858.

The right to a limitation of liability is an independent right given by federal statute in no way connected with the validity of claims against the shipowner. It is not a defense to petitioner's claim, but merely a limitation on the amount recoverable when execution is sought on the judgment. It is well settled by the authorities herein first mentioned that the judgment obtained prior to the petition for limitation of liability is only *res judicata* of the issue litigated, namely the validity of the claim and not of the right to limitation.

To the same effect in other situations are other cases decided by this court where it has been many times held that only issues covered by the pleadings and actually determined in the former suit are *res judicata*.

Hughes v. United States, 71 U. S. 232, 237, 18 L. ed. 203 (1866);

Packet Company v. Sickles, 72 U. S. 580, 592, 18 L. ed. 550 (1866);

Johnson Co. v. Wharton, 152 U. S. 252, 256, 38 L. ed. 429 (1894);

DeSollar v. Hanscome, 158 U. S. 216, 221, 39 L. ed. 956 (1895).

In *Cromwell v. County of Sac*, 94 U. S. 351, 352, 24 L. ed. 195 (1876), it was said:

"In considering the operation of this judgment, it should be borne in mind, * * * that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel

in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"*But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.* In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the

point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." (Italics ours).

See:

McComb v. Frink, 149 U. S. 629, 641, 37 L. ed. 876 (1892);

United Shoe Machinery Corp. v. United States, 258 U. S. 451, 458, 459, 66 L. ed. 708 (1922);

United States v. Southern Pacific Co., 259 U. S. 214, 240, 66 L. ed. 907 (1922).

In *Virginia-Carolina Chemical Co. v. Kirven*, 215 U. S. 252, 257, 54 L. ed. 179 (1909), it was said:

"If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was actually litigated and determined. * * *. * * * there are some defenses which are necessarily negatived by the judgment,—are presumed never to have existed. These are such as go to the validity of the plaintiff's demand in its inception or show its performance * * *. But this court has pointed out a distinction between such defenses and those which, though arising out of the transaction constituting plaintiff's claim, may cut it down or give rise to an antagonistic demand. Of such defenses we said, speaking through Mr. Justice Holmes in *Merchants' Heat & Light Co. v. J. B. Clow & Sons*, 204 U. S. 286, 51 L. ed. 488, 27 Sup. Ct. Rep. 285, that the right to plead them as a defense 'is of modern growth and is merely a convenience that saves bringing another suit, not a necessity of the defense.' And showing how essentially they are independent of the plaintiff's demand, although they might be a defense to it, it was said that when the defendant set them up he became a plaintiff in his turn, and subject to a jurisdiction that he otherwise might have denied and resisted."

In *Pierce v. National Bank of Commerce*, 268 Fed. 487, 496 (C. C. A. 8, 1920), the rule is announced as follows:

> "While the failure of a defendant to allege and prove facts purely defensive to an issue on trial between him and the plaintiff renders such matters res adjudicata after judgment, and estops him from again presenting them (1 Van Fleet on Former Adjudication, §198), yet, when defensive facts also constitute an affirmative cause of action against the plaintiff, the defendant has the option to interpose them as a defense, or to reserve them for an independent or cross action. If he refrains from presenting them as a defense, the judgment in the action against him does not bar nor adjudicate his affirmative cause of action upon them; and he is free subsequently to maintain it."

The following four decisions from this court cited in the petition at pages 11 and 12 do not support the contention here made by petitioner.

In *Grubb v. Public Utilities Commission*, 281 U. S. 470, 74 L. ed. 972 (1930), after a judgment by a state court upholding the validity of an order of the Public Utilities Commission it was attempted to relitigate the validity of the order in the federal court "upon one ground not brought to the attention of the state court" and in connection therewith the language quoted in petitioner's brief, page 3, was used to the effect that this could not be done and that the state court judgment upholding the validity of the order was conclusive as to all grounds of attack which might have been presented against the validity of the order.

In *Werlein v. New Orleans*, 177 U. S. 390, 399, 44 L. ed. 817 (1900), the city of New Orleans brought an action against Werlein to recover certain real property. One

n had previously obtained a judgment against the and had levied on the property in question, and the claiming the proposed levy and sale to be illegal arious grounds had unsuccessfully brought an action njoin the levy and sale. Werlein was the owner of the perty by mesne conveyances from the purchaser at sale. The city in the action against Werlein urged an tional ground of illegality that had not been asserted ne action against Klein. The judgment in the action nst Klein was held to be *res judicata*, the court saying:

"The fact now alleged would have furnished in the chancery suit but another ground or reason upon which to base the claim of the city, that Klein had no right to sell the property under his writ. In other words, it would have been additional proof of the cause of action set forth in that suit."

like character is *United States v. California & O. d Co.*, 192 U. S. 355, 48 L. ed. 476 (1903):

Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 71 L. 1069 (1927), a seaman having been injured filed a in admiralty setting up several acts of negligence in use of defective appliances resulting in a decree ing indemnity by way of damages and allowing ntenance and cure. Thereafter an action at law in the court was commenced for the same injury based negligent operation of the appliances and removed he federal court, the allegations of fact as to the in which the accident happened being substantially same as in the previous admiralty action. It was held his court, using the language quoted in petitioner's at page 33, that the plaintiff's claim for damages g "one and indivisible" and having been submitted

and passed upon in the admiralty action, the decree therein entered was *res judicata*.

In *United States v. Moser*, 266 U. S. 236, 69 L. ed. 262 (1924), it was held that where in an action by a retired naval officer against the Government for an installment of retirement pay the issue as to whether he occupied the status of an officer who had served during the Civil War was found in his favor, such judgment was binding on the Government in a subsequent action for another installment.

The following two cases further demonstrate that the judgment in the state court is not *res judicata* of the issue as to limitation of liability.

In *Friend v. Talcott*, 228 U. S. 27, 40, 57 L. ed. 718 (1913), a creditor objected to a composition in bankruptcy on the ground that his claim resulted from a sale on credit induced by a false statement. The composition was approved and the bankrupt discharged. Thereafter the creditor sued the bankrupt for damages suffered because of the deceit practiced in procuring the sale of the goods on credit. The bankrupt set up as *res judicata* the order arising from confirmation of the composition. In overruling this contention, the court said:

> "To constitute *res judicata*, it is elementary that there must be identity of cause between the two cases. In view of the text of the bankrupt law, the distinction which it makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge, it needs but statement to demonstrate the difference of cause which necessarily obtains between determining, on the one hand, in favor of the bankrupt, whether he is entitled to a general discharge, and of

> deciding, on the other hand, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge."

In *North Carolina R. Co. v. Story*, 268 U. S. 288, 289, 291, 69 L. ed. 959, (1925), a judgment was obtained in the state court against a railroad company for an injury occurring while the road was under Federal control. Under section 206 (g) of the Transportation Act of 1920 it was provided in part as follows:

> "No execution of process * * * shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

This section was not pleaded in the action in which the judgment was obtained. Thereafter a second suit based on the first judgment was commenced in the state court. The company, by answer, set up Section 206 (g) above quoted. The plaintiff demurred upon the ground that the first judgment had become *res judicata*. The court rendered judgment for the plaintiff which was affirmed on appeal.

The company then brought an action in the state court based on Section 206 (g) to permanently enjoin execution on the judgment so obtained and the answer set up the second judgment as *res judicata*. The action of the lower court refusing to grant the permanent injunction was affirmed on appeal. This judgment of affirmance was reversed by this court, saying:

> "The supreme court based its decision on the facts admitted in the petition and answer. Its judgment was that the previous judgment as between the

parties was res judicata, estopped the company from resisting execution, and thereby deprived it of any right to either a temporary or permanent injunction. * * *.

"* * * it may be conceded that the first judgment against the company in favor of the administrator, however erroneous it was * * * not having been appealed from, was res judicata. Nor could section 206 (g) prevent the second judgment. It was not directed against judgments. It was intended to protect the property of the company, not by preventing a judgment, but by preventing an execution to satisfy a judgment * * *. The language of the statute assumes the existence of judgments against carriers for fault of the government management before the section comes into play * * *. * * *.

"It is well settled that the principle of res judicata is only applicable to the point adjudged and not to points only collaterally under consideration, or incidentally under cognizance, or only to be inferred by arguing from the decree. * * *."

In reversing this cause this court necessarily held that Section 206 (g) was not a defense that the company was required to set up in the action in which the judgment was first obtained, but that the same could be taken advantage of thereafter upon judgment being obtained without the company being subjected to the contention that the matter was *res judicata*.

It is submitted that the petition for limitation of liability filed by the respondent is a different right, claim or demand than that litigated in the state court and that the bar of the state court judgment is limited to that which was actually litigated and determined, namely, the validity of petitioner's claim.

Petitioner refers to *Carlisle Packing Co. v. Sandanger*,

259 U. S. 255, 66 L. ed. 927 (1922), at page 34 of his brief in which case it was held that where the *privilege* of limitation of liability was not set up or claimed in the answer in a state court action, it could not be first presented upon a request for a charge to the jury. This is merely a statement of a well recognized principle that the issues upon which a case are to be tried must be framed by the pleadings and not by the charge to the jury. This case cannot rightfully be made authority for the proposition that a petition for limitation of liability filed after judgment comes too late.

Some concluding remarks are made by petitioner relative to hardships should the practice followed in this case be approved. It is submitted that where as here the seaman has been accorded a common law remedy on his claim, the owner, if he so desires, should be permitted to obtain a limitation of liability binding not only on the particular claimant, but on all others that might exist. As it is common for seamen's claims to be asserted at the very close of limitation periods, the only practical method by which an owner may secure full limitation of liability is by obtaining a federal court limitation. Such incidental expense, if any, which might have to be borne by the seaman having a judgment if he chooses to contest the limitation, would scarcely appear to be an adequate reason for depriving the ship owner of the statutory right.

To hold, as contended for by petitioner, that a ship owner *must* set up the right to limitation in a state court action, is to place upon the shipowner a burden not contemplated by the limitation statute and to restrict

rather than to give it a liberal construction. If a seaman be injured at the commencement of a voyage and institutes suit at law, under petitioner's contention the shipowner would be required to seek limitation in that action, and if concluded to judgment and paid, and thereafter on the same voyage other claims arose, the shipowner would have been deprived of the full limitation granted by the statute. Nor is the shipowner in a position to know whether there is any need for limitation of liability until it is first determined that the claim or claims presented are valid, nor the amount of the limitation fund until the voyage has terminated.

CONCLUSION

It is respectfully submitted that the decision of the Circuit Court of Appeals here sought to be reviewed is correct and not in conflict either with the decisions of this court or of any other federal court, but on the contrary follows the law as first established by this court in *The Benefactor*, 103 U. S. 239, 26 L. ed. 351 (1880), and since followed by every court to which the question has been presented, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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